Office Supreme Court, U.S.
FILED
JUL 16 19
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962.

No. 256

ESTATE OF ANNIE E. HURST, DECEASED.

Petition of Harry J. Alker, Jr.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA, AFFIRMING THE DECISION OF THE ORPHANS' COURT OF MONTGOMERY COUNTY, PENNSYLVANIA.

ROBERT M. TAYLOR,
2215 Land Title Building,
Philadelphia, Pennsylvania,
Attorney for Petitioner.

International, 711 So. 50th St., Phila. 43, Pa.

TABLE OF CONTENTS.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	3
Constitutional Amendment Involved	4
Statement of the Case	5
Basis of Federal Questions	20
Reasons Relied Upon for Allowance of the Writ	21
Argument	22
Conclusion	27
Appendix:	
Opinion of the Supreme Court of Pennsylvania	1a
Opinion of the Orphans' Court of Montgomery County, Pennsylvania (see Record, Vol. 1, p. 3a)	
Petition for Reargument	7a
Answer to Petition for Reargument	10a
Will of Winfred Hurst	13a

TABLE OF CASES CITED.

	Page
Di Maio's Estate, 363 Pa. 559	25
Howard Sports Daily v. Wellar, 18 A. 2nd 210, 179 M. D. 355	27
Kerr v. Donovan, 389 Pa. 614, 134 A. 2nd 213 (1957)	23
Mohler's Estate, 343 Pa. 299	25
Pusey's Estate, 321 Pa. 248, 184 Atl. 844 (1936)	23
Quein Will, 361 Pa. 133, 62 A. 2nd 909 (1949)	22

STATUTES CITED.

	Page
Act of Congress of June 25, 1948, c. 646, 62 Stat. 929	2
28 U. S. C. A. Section 1257(3)	2
United States Constitution, Fourteenth Amendment	3, 4

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No.

ESTATE OF ANNIE E. HURST, DECEASED.

PETITION OF HARRY J. ALKER, JR.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPPREME COURT OF PENNSYLVANIA, AFFIRMING THE DECISION OF THE ORPHANS' COURT OF MONTGOMERY COUNTY, PENNSYLVANIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Harry J. Alker, Jr., hereby respectfully petitions your Honorable Court for allowance of a Writ of Certiorari to review the judgment of the Supreme Court of Pennsylvania entered March 13, 1962, affirming the Definitive Decree of the Orphans' Court of Montgomery County, Pennsylvania, and in support thereof, submits the following data:

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania, filed March 13, 1962, does not appear to be reported. A copy of same is in the Appendix hereto at page 1a.

The opinion of the Orphans' Court of Montgomery County, does not appear to be reported.

A copy of same is in Volume 1 of the Record, page 3a.

JURISDICTION.

The opinion and decision of the Supreme Court of Pennsylvania was filed on March 13, 1962, and a timely petition for Reargument was filed with said Court, claiming the adjudication and opinion were a denial of federal and state constitutional due process.

The petition for Reargument was denied on April 16, 1962.

The statutory provision conferring jurisdiction on your Honorable Supreme Court to review said judgment and decision by Certiorari is that contained in the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, reading thus: "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised, under the United States"; 28 U. S. C. A. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

(1) Did the Decision, Order and Opinion of the Supreme Court of Pennsylvania (a) violate and abridge the privileges of the Appellant-Petitioner, Harry J. Alker, Jr.; (b) deprive him of his property, without due process of law; and (c) deny to him the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States; because they are founded on bias, prejudgment, and unsupportable and unwarranted disbelief of Appellant-Petitioner and his witnesses?

(2) Did the order, decision, opinion and adjudication of the Orphans' Court of Montgomery County, Pennsylvania, (a) violate and abridge the privilege of the Appellant-Petitioner, Harry J. Alker Jr., (b) deprive him of his property, without due process of law, and (c) deny to him the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States; because they are based on bias, prejudgment and unsupportable and unwarranted disbelief of Appellant-Petitioner and his witnesses?

(3) Was the Orphans' Court of Montgomery County, Pennsylvania, and the Supreme Court of Pennsylvania so prejudiced against the Appellant-Petitioner that it prejudicially affected their findings and decisions in said matter, and, by showing bias, prejudgment and unsupportable and unwarranted disbelief of Appellant-Petitioner and his witnesses, violated his aforesaid privileges and rights and denied him due process of law, as afforded him under the Fourteenth Amendment to the Constitution of the United States?

(4) Did the Supreme Court of Pennsylvania violate Appellant-Petitioner's constitutional rights and privileges in denying him a reargument of his appeal?

(5) Was Annie E. Hurst deprived of her rights to make a will, leaving her property in such manner as she pleased, and not to have it escheat, in violation of her constitutional rights as provided by said Amendment?

CONSTITUTIONAL AMENDMENT INVOLVED.

(Fourteenth Amendment.)

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

STATEMENT OF THE CASE.

This petition for Certiorari seeks to persuade your Honorable Supreme Court to review the judgment of the Supreme Court of Pennsylvania, affirming the definitive decree of the Orphans' Court of Montgomery County, Pennsylvania, sustaining its findings that the petitioner, Harry J. Alker, Jr., had exercised undue influence upon Annie E. Hurst in the drawing of her last will and testament on December 2, 1949.

The pertinent facts are as follows:

Annie E. Hurst, a widow and resident of Montgomery County, Pennsylvania, immediately adjacent to Philadelphia, died at the age of 83 years, on January 18, 1958, leaving a last will and testament, dated December 2, 1949, when she was 74 years of age, which had been drawn, at her direction, by Harry J. Alker, Jr., a then practicing lawyer in the city of Philadelphia, Pennsylvania.

A will contest was initiated by appeal from the probate of said will in the office of the Register of Wills for Montgomery County, Pennsylvania. The validity of the will was contested by some of the residuary legatees under Winfred's will, who claim they are entitled thereunder to the $25,000.00 remaining in the trust fund in the event that Annie E. Hurst failed to exercise the given power of appointment.

An issue devisavit vol non was granted by the Orphans' Court of Montgomery County and the matter was tried by Chief Judge Taxis without a jury.

The contestants sought to invalidate the said will on the grounds of (1) lack of testamentary capacity, and (2) undue influence.

The Orphans' Court found, in a definitive decree, that the decedent, Annie E. Hurst, had testamentary capacity, but that petitioner, Harry J. Alker, Jr., had exerted undue influence upon her. The specific legacies to Mary Lee Hill

(Dandridge) her personal maid and Dr. Robert S. Crew her personal physician were thereby sustained, but the legacy to petitioner, Harry J. Alker, Jr., and his appointment as executor were invalidated.

The petitioner appealed from the said Orphans' Court definitive decree to the Supreme Court of Pennsylvania, maintaining that the lower Court erred in finding the existence of undue influence and also questioned the legal standing of the Appellees in the appeal.

The petitioner bases his petition for certiorari on the grounds that the decisions, orders and opinions of (first) the Supreme Court of Pennsylvania, and (second) of the Orphans' Court of Montgomery County, Pennsylvania, were founded on bias, prejudgment, and unsupportable and unwarranted disbelief of petitioner and his witnesses, thereby depriving him of his property without due process of law and the equal protection of the law, all in violation and abridgement of the rights and privileges provided him by the Fourteenth amendment to the Constitution of the United States.

The Supreme Court found against petitioner, upholding the lower Court's findings, wherefore this petition for certiorari.

The testatrix lived at 525 Willow Grove Avenue, Wyndmoor, Montgomery County, Pennsylvania, with her son Winfred Hurst, who died unexpectedly of heart failure on November 7, 1949, while in middle age.

There were no other next of kin, and any part of Annie E. Hurst's will which is not distributed by her will escheats to the Commonwealth of Pennsylvania, which is a party to this action.

Winfred Hurst, a certified public accountant with offices in Philadelphia, had been a personal friend and an intimate business associate of petitioner, Harry J. Alker, Jr., for many years. This friendship was recognized and proven by Winfred Hurst by his willing and bequeathing to petitioner a one-eighth share of his residuary estate as

well as appointing him executor of his will and trustee of the trust as provided in his last will, dated September 4, 1944.

In his will, Winfred established a trust fund of $100,000.00 for his mother, Annie E. Hurst, and petitioner, Harry J. Alker, Jr., was named as sole trustee with authority to use both the income and the principal of the trust for her maintenance and support.

In his will, Winfred Hurst also bequeathed one-eighth residuary shares to Russell C. Pullinger, Clara L. Roth, Jane Roth, Jean Roth (daughters of Clara Roth), Marguerite Somers, Rae Newmark and Mrs. Gilbert A. Sitler.

Winfred Hurst was the scrivener of his own will, described above. In his will, he also provided "my mother shall have the right to dispose by her will up to twenty-five thousand dollars ($25,000.00) of the estate remaining in trust under this paragraph for her at the time of her death. If she should not exercise the power of appointment aforesaid, then all the principal estate remaining in trust under this paragraph at her death shall pass under, and become part of the estate disposed of by the residuary clause of this my will." There were sufficient funds in the Winfred Hurst estate to make this provision effective.

In her will, Annie E. Hurst disposed of her estate as follows: A $10,000.00 legacy to Mary Lee Hill (now Mary Lee Dandridge), a $5,000.00 legacy to Dr. Robert S. Crew, and the remainder to Harry J. Alker, Jr., and he was named executor thereof. The will also exercises a power of appointment over the $25,000.00 fund granted to her by her son's (Winfred) will.

As stated previously, the decedent had no living relatives, so should any part of the will be invalidated, such part of the estate covered thereby will escheat to the Commonwealth of Pennsylvania.

Mrs. Hurst, at the time she executed her will on December 2, 1949, possessed personal property valued at approximately $29,000.00 (including bank accounts), her resi-

dence, and the testamentary power of appointment provided for in her son's will over the $25,000.00 fund. Her testamentary estate being valued at approximately $46,000.00 plus the $25,000.00 power of appointment.

On December 12, 1949, Anna E. Hurst fell out of her bed, fractured her hip and was hospitalized by Dr. Robert S. Crew, her personal physician, who was called by Susie, the maid, to attend Mrs. Hurst. She was at the Chestnut Hill Hospital for some time and was then taken to the Butler Nursing Home for Convalescence.

The trial judge holds in his opinion that ". . . Harry J. Alker, Jr. is indeed an interested party, not only is he scrivener but he is also executor and the sole residuary legatee. He certainly will gain or lose by the outcome of the present proceeding, for if the will is held invalid the residue would not be payable to Mr. Alker but would escheat to the Commonwealth, while the property over which Mrs. Hurst had a power of appointment would pass to the residuary legatees under Winfred's will.

"While the fact of a party's interest would neither automatically disqualify nor discredit him as a witness, yet it is a factor requiring grave consideration in the evaluation of his testimony. His credibility, therefore, must be determined on the basis of various factors including in large measure his interest or lack of interest in the outcome of the litigation.

"To a limited degree, Mr. Alker's testimony is corroborated by Doctor Robert Crew, whose testimony will be discussed in a moment, but since Mr. Alker has an extensive pecuniary interest in the outcome of this litigation, I am inclined to give his testimony much less probative weight than if he were merely the scrivener without any pecuniary interest.

"Even then, of course, a lawyer who draws a will and participates in the trial of a contest upon the instrument in which his handiwork is under attack is indeed also a

party in interest, and his testimony cannot be considered disinterested. See Masciantoris Will, 392 Pa. footnote 12, page 376.

"But more to the point on the question of the credibility of this witness is the serious impeachment thereof by reason of his conviction in matters before the Federal Court concerning his income tax evasions for which he served a period of some months in the Federal penitentiary. This, together with other matters, served as a substantial factor leading to his disbarment by the Orphans' Courts of Philadelphia and Montgomery Counties, and of the Pennsylvania Supreme Court. See Alker Disbarment case, 398 Pa. 188. . . ."

The Supreme Court of Pennsylvania in its opinion finds inter alia, that: ". . . The court below refused to believe the testimony of Alker. There was sound reason for this conclusion. . . ."

The Trial Judge in his opinion referring (N. T. 815a) to the evidence submitted by the proponents of the will in rebuttal to the contestants' evidence to determine whether that evidence was sufficient in quality and quantity to the affirmatively established decedent's testamentary capacity in light of the fact that contestants' evidence had dispelled or dissipated the presumption of testamentary capacity initially available to the proponents, refers (N. T. 815a, 816a) only to witness Dr. Robert S. Crew, the subscribing witnesses, Mrs. Emma McGuigan and Mrs. Mary Pandolfi, and Mary Lee Dandridge. The trial Judge does not refer to the testimony and evidence given by witnesses, Horace S. Rhoads (N. T. 306a, 335a), Mrs. Elizabeth Butler (N. T. 293a-300a), and John H. Weber (N. T. 593a-606a).

Mr. Rhoads testified that during the fall and winter of 1949 he was employed by Harry J. Alker, Jr. as an accountant; that he visited Mrs. Hurst at her home about ten times within four weeks, after her son's death on No-

vember 7, 1949, to supply her with money to pay the maid and to purchase food for the house, and to take care of anything that might be wrong there. That on three of these occasions he was accompanied by Mr. Alker and a Mr. Carpenter, one of Winfred Hurst's employees. That the conversations with Mrs. Hurst were usually about television programs that she had seen, her son, and the house.

Mr. Rhoads further stated that he recalled distinctly Mrs. Hurst coming to Mr. Alker's office on at least three occasions during that period. That on her second visit he talked to her about the securities she owned as he had been asked to furnish her with a list of her securities, which he did, in Mr. Alker's office.

Upon being questioned to describe what he had observed about Mrs. Hurst's ability to understand normal conversation, he stated Mrs. Hurst had a hundred per cent. ability to describe normal conversation, and when he spoke to her she always understood him. That on one occasion, when he and Mr. Alker were at her home, there was a discussion about her ownership of her residence. That she knew and told him she owned it although her son had attempted to devise it to her.

On cross-examination he stated Mrs. Hurst made her trips with Susie to Mr. Alker's office, using public transportation and under her own locomotion, and on one occasion at her residence he saw her sweeping leaves off the porch and pavement.

Mrs. Elizabeth T. Butler testified that she was a registered nurse and operated the Butler Nursing Home on Penllyn Pike, Blue Bell, Montgomery County, Pennsylvania. That on January 4, 1950, she took Annie Hurst as a patient, suffering with a fractured hip, and who was brought there in an ambulance from the Chestnut Hill Hospital. That Mrs. Hurst stayed there for three full weeks and all during this period she conversed daily with Mrs. Hurst, and that Mrs. Hurst ordered and read a daily newspaper, The Philadelphia Inquirer. The witnesses also

stated that Mrs. Hurst was a very learned woman and educated, although this was objected to as a conclusion which was sustained by the Court. Also that she would recite old time songs and would read the paper out loud, and they discussed the Chestnut Hill society news.

Although there is much substantial, competent evidence in this record as to Mrs. Hurst's ability to read, it is interesting to note how the contestants tried to impress the Court that she could not read, particularly, her will. At N. T. 296a, when Mrs. Butler was testifying, the following questions took place:

By Mr. Fox: (representing Mr. Alker)

Q. What about the newspaper? Who would give her the paper?

A. Well, one of the nurses would give it to her, or I would give it to her. There is more than one nurse you know.

Q. Did you ever see her reading the newspaper?

A: Yes, I did.

Mr. Roberts: (representing contestants) That is objected to as a conclusion.

By The Court:

Q. Well, apparently reading—at least holding it so that it looked to you as though she were reading it?

A. Oh, no, she read it, sir.

Q. Did she read aloud?

A. Oh, yes.

Q. She would read aloud?

A. Oh, yes, Mrs. Hurst was a very intelligent woman. (Objected to by Mr. Roberts as a conclusion.)

By Mr. Fox:

Q. How do you know she read the paper?

A. Well, suppose I read the Bible here; wouldn't you hear me?

Q. Did she read aloud?
A. Yes.

Mrs. Butler further testified that Mrs. Hurst watched the television sent to her by Doctor Crew, particularly to see the Mummers' Parade which had been postponed from New Year's Day, which she enjoyed very much.

Mrs. Butler then testified to a very important occurrence which the Trial and Appellate Courts have not picked up in the consideration of the matter. She stated that on or about June 17, 1957, she was visited by a very swarthy looking young man (N. T. 298a) who said he represented the Commonwealth of Pennsylvania, and wanted her to say that Mrs. Hurst was mental, and she said "no, I will not". That he then said "well I wish I could find some one that would say Mrs. Hurst was mental." She identified the man as being present in the courtroom whose name was later found to be Joseph Panosetti. On cross-examination Mrs. Butler testified that she had not observed Mrs. Hurst as being senile, nor that she had any great difficulty in answering questions, but to the contrary she observed Mrs. Hurst's mental faculties were all alert.

John H. Webb testified (N. T. 593a-595a) that he occasionally did some work at the Butler Nursing Home as he was a friend of Mrs. Butler. That he met Mrs. Annie Hurst there as he had prepared her room for her and saw her three or four times during her stay there. That he had on three or four occasions talked to her, and heard her talk to other persons. That he also saw her reading the newspaper and a book, some of which she read out loud, such as topics of the times; and that she also watched her television, set up in her room. Further that Mrs. Hurst walked around her room although limping a little.

The opinion of the Supreme Court of Pennsylvania pertaining to undue influence of Mr. Alker, states: ". . . In the present case, it is admitted that a confidential relationship existed between Alker and the testatrix; also that

he was her advisor; the scrivener of her will; that he was the individual to whom she had to look for support and maintenance following her son's death; and, that at the time she made him the primary beneficiary under her will she knew him for a period of less than four weeks. The evidence clearly justifies the finding that during the period the will was executed she suffered from shock and grief caused by her son's recent death and was in a state of bodily infirmity and greatly weakened mentality. . . ." To the contrary, the record discloses Mr. Alker knew Mrs. Hurst much longer than four weeks, in fact for a number of years.

The opinion of the Orphans' Court of Montgomery County re undue influence found: "it cannot be denied that the decedent, who was competent to execute the will, nevertheless suffered bodily infirmity and greatly weakened mentality at the time of execution. Her old-age, arteriosclerotic condition, current sickness, occasional repetition and incoherent speech, peculiar conduct, memory lapses, and the recent death of her son caused and show that condition to have existed."

In complete contrast, however, the Orphans' Court trial Judge accepted as true and accurate Dr. Crew's observations that on the day immediately before and the day immediately after the execution of the will decedent was "an average or normal woman of her age" (N. T. 834a).

The trial court Judge thus adjudicated for the purpose of testamentary capacity the decedent was "an average or normal woman for her age", but for the purpose of undue influence that same decedent on that same day was suffering from "bodily infirmity and a greatly weakened mentality".

On each side of decedent's home were other homes. On one side was the Snyder home and on the other side the Malloy home, until October, 1946, and thereafter the Antonelli home. Those neighbors were the principal factual witnesses. Those neighbor witnesses were Mr. Antonelli,

Mrs. Malloy, Mrs. Snyder and Mrs. Snyder's daughter, Dora Coleman.

The Trial Court found that should one accept their testimony the decedent lacked testamentary capacity (815a). The Trial Court found decedent had testamentary capacity (841a). The Trial Court therefore rejected the testimony of those contestants' witnesses. That is so for it was those contestants' witnesses who testified that the decedent was repetitious and incoherent of speech, had peculiar conduct and memory lapses and suffered bodily infirmities and a generally weakened mentality.

A perusal of these witnesses' testimony indicates that they were witnesses prejudiced against Harry J. Alker, Jr., firstly, by personal animosity, and (secondly), by that strange swarthy young man by the name of Joseph Panosetti who was an investigator from the State of Pennsylvania Department of Escheat who visited these witnesses and apparently turned them against Alker with the purpose of having the estate or part of it escheat.

Mrs. Helen Snyder testified (74a-79a) that on Friday, June 19, 1959, she spoke to Mr. Allen, one of Alker's counsel, on the telephone, and told him she was not in sympathy with Mr. Alker's part in the case, that she knew about his part in the case because she had talked with a representative of the Department of Escheat, and he had explained to her what was going on; also that she had offered to buy Mrs. Hurst's furniture, which was rejected by Alker.

Severio Antonelli testified (140a-142a) that a young man had come to speak to him about the case, some time before the trial, and who he later partially recognized at the trial to be Joseph Panosetti. That the man questioned him about Mrs. Hurst, that there was something said about there was some difficulty involved with the will, but he became evasive as to what was actually said between them.

Mr. Antonelli also testified that he had attempted to buy the Hurst house but Mr. Alker rejected his offer and was rude to him when he visited him at his office.

Even Russell C. Pullinger testified (209a) that when he visited Winfred Hurst up to May, 1949, and met Mrs. Hurst, she would always be very cordial and gracious and sometimes even shake hands with him; and even Mrs. Dora Coleman, daughter of Mrs. Snyder, referring to Mrs. Hurst, testified (157a) that "one strange thing about her that she could give the appearance for a very brief moment of being quite rational."

The contestants' other witnesses had no direct knowledge of Mrs. Hurst's condition when, or proximate to when she executed her will. Amongst those other contestants' witnesses were three doctors, namely Dr. Klevan, Dr. Lewis and Dr. Linden. None of these doctors consulted with or heard the testimony of Dr. Crew, the attending physician, or saw decedent until months after she executed her will, December 2, 1949. Doctors Kleven and Lewis first saw decedent July 28, 1950 and then found her senile. The third doctor, Dr. Linden never saw the decedent. His opinion was based solely upon his evaluation of the contestants' trial testimony.

In contrast to these three doctors, Doctor Crew, the family physician, professionally saw Mrs. Hurst on the day before and the day after she executed her will. Because of Winfred Hurst's sudden death on November 7, 1949, Dr. Crew saw the decedent on November 9, 1949 and found her to be in normal grief and administered a mild sedative (434-5a). Following that visit, Doctor Crew saw Mrs. Hurst on routine visits, namely on November 21st, December 1st, and December 3rd, 1949 (N. T. 436a).

As the result of those visits and Doctor Crew's prior knowledge of the decedent, Dr. Crew testified that decedent was a relatively healthy woman up through the date of his visit of December 3, 1959 (N. T. 442a), and that she was cooperative and pleasant to deal with and always able to give an accurate and explicit history of any minor complaints that she might have (427a).

The Court below accepted Dr. Crew to be an accurate, reliable, competent witness (834a).

The proponents' witness who best knew Mrs. Hurst was Mary Lee Hill (Dandridge). She lived with the decedent and had lived with her some eight consecutive years prior to December 2, 1949 (N. T. 340a). Mary Lee Dandridge, as described by said Mrs. Helen Snyder, was: "as far as I know, she was everything that you could want in a maid and a nurse" (N. T. 64a) and she (Mrs. Snyder) "did not think it unusual that Susie (Mrs. Dandridge) was named as a legatee" (N. T. 80a).

Susie's testimony was clear and forthright and described Mrs. Hurst as healthy and mentally alert and that she continued to manage her household affairs, her marketing and other normal activities up to and through December 2, 1949 (N. T. 348a) and until her accident and confinement in the hospital. She also testified that on December 2, 1949, Mrs. Hurst, in her company, voluntarily went from their home to Harry J. Alker, Jr.'s central city office (N. T. 350a); and shortly before on two other occasions went to Mr. Alker's office (N. T. 498a). That the December 2, 1949, trip was by taxi, because of inclement weather (N. T. 498a) and the other two trips were by bus and subway (N. T. 498a).

That on entering or leaving the subway it was necessary for the decedent to climb or descend a long flight of steps. She so climbed and descended.

Contestants offered no evidence which challenged that the decedent voluntarily made those three trips to Alker's central city office, nor that challenged that the purposes of the first two trips were to determine whether she could afford to live in her Chestnut Hill (Wyndmoor) home and to be apprised of the extent and value of her securities and estate, and the purpose of the December 2, 1949 trip was to draft her will and to have it executed.

On that third trip, in Mrs. Hurst's presence, Mr. Alker dictated her will to his secretary, Mrs. Pandolfi, who then,

with Mrs. McGuigan (his telephone operator and receptionist) were the two subscribing and attesting witnesses (N. T. 271a). These two subscribing witnesses testified at trial, as the Court's witnesses (N. T. 286a, 530a).

Mrs. Pandolfi testified that Mr. Alker dictated Mrs. Hurst's will in Mrs. Hurst's presence and that Mrs. Hurst appeared to understand and comprehend it, and that, thereafter, in her presence and the presence of the second subscribing and attesting witness, Mrs. Emma McGuigan, Mrs. Hurst read her then typewritten will, and then voluntarily and without aid or apparent difficulty signed her will (N. T. 526-9a) in their presence.

Mrs. McGuigan testified she saw and heard Mr. Alker, in Mrs. Hurst's presence, read aloud the typewritten will, and that upon Alker's completion of that reading, Mrs. Hurst stated: either "that's that" or "that's it" and voluntarily without aid or apparent difficulty, executed her will (N. T. 537a).

Decedent's signature to her will is in a firm and clear hand (N. T. 3a).

The Court's attention is also called to the fact that Mrs. McGuigan testified (N. T. 543a) that she had seen Mrs. Hurst come to Mr. Alker's offices in 1948.

Also, that when Mrs. Pandolfi (N. T. 279a) was asked, on cross-examination, if she knew of any prior transactions between Mrs. Hurst and Mr. Alker, she testified that Mrs. Hurst was Mr. Alker's personal friend.

The Trial Court and Appellate Court ignored the positive testimony of the subscribing witnesses when it concluded that the will was drafted and executed as the result of undue influence.

The Trial Court and Appellate Court concluded that because Alker was the scrivener, the named executor and residuary legatee, he was a party of interest and therefore his testimony carries slight weight.

The Courts below further concluded that Alker's credibility as a witness was seriously impeached by his convic-

tion in his personal income tax prosecution and his disbarment from the practice of law by reason thereof.

It should be noted by the Court that throughout the testimony of the contestants' neighbor witnesses, they all testify to Mrs. Hurst's physical ability, to her sweeping the pavement, working in the garden and taking long walks. This is certainly not testimony or evidence of a person having a greatly weakened physicial condition.

It should also, respectfully, be noted by the Court that Mrs. Hurst lived for a number of years after the execution of her will and could have changed the provisions therein or made a new will.

Mrs. Helen Snyder corroborated Alker's testimony as to the ill feeling Mrs. Hurst had against Clara Roth when she testified that Mrs. Hurst had talked to her about Clara Roth and her association with Winfred Hurst; and that she told her she wasn't too happy about the situation.

It is contended that the Trial Court and the Appellate Court should have taken this fact into consideration as a reason for Mrs. Hurst's making her will the way she did; particularly in exercising her power of appointment so that Mrs. Roth and her family would not share in that part of Winfred's estate.

Also, if the power of appointment had not been exercised by Mrs. Hurst, Harry J. Alker, Jr. would have received the sum of $3,125.00 as his one-eighth residuary share in Winfred Hurst's estate.

Harry J. Alker, Jr. testified that he prepared the will of Mrs. Annie E. Hurst as she directed; that he was present when Mrs. Hurst and the two subscribing witnesses, Emma H. McGuigan and Marie J. Marino, signed the will on December 2, 1949. That she read the will and he read the will to her in the presence of the two witnesses and asked her if that was what she wanted, and she told him that it was. That previous to the making of the will she visited his office several times, to find out about her affairs

and how things stood and so forth; what she was going to do, and so forth. That she asked about what property she had and they went over them.

As to the beneficiaries in her will, she told him that they were her nearest and best friends and that she had to rely upon them. That she had no relatives and that he, Susie and Doctor Crew were all that she had. He stated that when Winfred Hurst was living they were friends and Winfred counted on him for everything. That Mrs. Hurst relied upon her son while he lived and, after that, she relied on him, as her son had told her to do; and that up until the time of her death in 1958 he took care of Mrs. Hurst's funds and the trust fund for her support, and made a final accounting of same.

Mr. Alker further testified on cross-examination that after Winfred's death he had visited Mrs. Hurst at her home several times and she in turn visited him at least three times at his office. Also, prior to Winfred's death, he had seen Mrs. Hurst at their house and he knew her from going there; also that her sister, Mrs. Gerstlauer, had an accident matter which he handled for her and he believed he saw Mrs. Hurst at her home this time between 1944 and 1946. That his visits to the Hurst home were in connection with the sister's accident case and her estate after she had died. That he regarded Win and Mrs. Hurst as his good friends, and had been her and her family's attorney at least since 1944 or '45 (N. T. 629a-630a).

Further, that on December 2, 1949, Mrs. Hurst knew what her individual estate consisted of, that exclusive of the Gerstlauer sum of $12,763.19, it was $15,432.34 plus her house. That she had a balance of $7,264.42 in the Philadelphia Savings Fund Society, $2,000 of New York Water bonds, ten shares of Atlas Powder, two shares Cities Service, two shares of Washington properties, ten shares of P. T. Company Common, and ten shares of P. T. Company Preferred, plus an automobile and personal household goods, also various shares of stock which were of no value.

Mr. Alker also testified under cross-examination that Mrs. Hurst knew about her power of appointment and that he had discussed it with her. That she didn't want any of the Roths, Newmark or Pullinger to get any of it, as she was sore at them (N. T. 636a-642a). That Pullinger and Newmark walked out on her son and tried to steal his business. That Mrs. Hurst knew about Winfred's improper association with Mrs. Roth and disapproved of it. That she repeatedly had told him she was going to live a long time even at the time her will was made when she stated "whatever is left, I leave to you; I hope I will live a great many years and spend it on myself (N. T. 817a).

The contestants, in addition to placing in the record said personal income tax indictment and conviction, also placed in the record another criminal indictment which has now been dismissed as a result of a motion authorized by the United States Attorney General and allowed by the Federal District Judge; and although it does not appear in the record allegations against Mr. Alker have been found to be without basis.

BASIS OF FEDERAL QUESTIONS.

The Federal constitutional question of a denial of due process and equal protection of the law apparently was first brought up by the Appellant-Petitioner's Petition for Reargument before the Supreme Court of Pennsylvania. The Petition for Rehearing is part of the record and the contestants' Answer to the Petition for Reargument is also in the record and contains what is in substance an admission that the Federal Constitution point was duly made at this time and in the manner stated by the petitioner.

The petitioner also claims and contends that a review of the record as a whole reflects and evidences his allegations of constitutional violations.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. The Supreme Court of Pennsylvania and the Orphans' Court of Montgomery County, Pennsylvania, in finding petitioner committed undue influence upon Annie E. Hurst has denied him due process of law, because it has deprived him of property properly willed to and belonging to him. That the same was done due to undeserved bias and prejudice against him.

2. That the finding of undue influence by petitioner upon decedent was in error.

3. The lower courts have decided this case contrary to the great preponderance of evidence produced by the petitioner proving decedent was of sound mind and body, and sufficiently so to lawfully execute her will.

4. Out of all good conscience, justice, fairness and equity, the lower court's decisions as to the findings of undue influence should be reversed.

5. For proper administration of the courts, these lower court decisions should be reversed.

ARGUMENT.

Questions 1 to 5, inclusive.

The petitioner claims and contends that the Supreme Court of Pennsylvania, as well as the lower trial court, violated and abridged his constitutional privileges and rights by depriving him of his property without due process of law, and denied to him the equal protection of the law, as provided by the Fourteenth Amendment to the Constitution of the United States.

That instead of accepting his testimony as to its true worth and correctness, they were so prejudiced by other actions that he had previously been concerned in, they gave it practically no credence at all, and accepted the alleged proof produced by the prejudiced contestants' witnesses.

Further, that this also affected the Court's thinking in rejecting the right of Annie E. Hurst to will her property as she so desired.

In support of the same this Honorable Court's attention is drawn to the evidence produced by the petitioner and his witnesses, which it is claimed by petitioner overwhelms the yardstick of undue influence cited by the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania cites the case of *Quein Will*, 361 Pa. 133, 62 A. 2nd 909 (1949), in which that Court succinctly defines what constitutes undue influence sufficient to void a will, and explained the burden and nature of proof where such is asserted. "There must be imprisonment of the body or mind, frauds or threats or misrepresentations, or circumstances of inordinate flattery, or physical or moral coercion to such a degree as to prejudice the mind of the testator, or destroy his free agency, or to operate as a present restraint upon him in the making of the will." Generally, there is a presumption of the absence of undue influence and the burden of the proof is upon those who assert it. However, "where there is evidence of confidential relation coupled with a weakened mind, the burden of proof shifts to the proponents. Such evidence, however,

need not be sufficient to establish testamentary capacity. All the evidence need show is bodily infirmity and weakened mentality. Where the evidence shows bodily infirmity and greatly weakened mentality, and a stranger to the blood of the testator, standing in a confidential relationship, is benefited by the will in which he has been instrumental in having executed, a presumption of undue influence arises." pp. 145 & 146. Accord, *Kerr v. Donovan*, 389 Pa. 614, 134 A. 2nd 213 (1957).

The Pennsylvania Supreme Court assumed in arriving at its decision that there was a confidential relationship between Mr. Alker and Mrs. Hurst, also that he was her advisor, the scrivener of her will; that he was the individual to whom she had to look for support and maintenance following her son's death; and, that at the time she made him the primary beneficiary under her will she knew him for a period of less than four weeks. It therefore found that the evidence of same clearly justified the finding that during the period the will was executed she suffered from shock and grief caused by her son's recent death, and was in a state of bodily infirmity and greatly weakened mentality. Hence the burden of proving the absence of undue influence was definitely on Alker. The Court then cited the case of Pusey's Estate, 321 Pa. 248, 184 Atl. 844 (1936).

Petitioner protests the Court's finding that Alker only knew Mr. Hurst for less than four weeks before he prepared her will. To the contrary, he contends and argues that he knew her for a number of years before she executed her will on December 2, 1949. That he was the Hurst family lawyer, having come into contact with her many times, both at her home and in his office. That he had handled Mrs. Hurst's sister's (Mrs. Gerstlauer) accident case and Mrs. Gerstlauer's estate after she died, leaving a will in which Mrs. Hurst was the sole beneficiary. This was all in addition to his friendship and business association with Winfred Hurst.

Mr. Alker's testimony is corroborated by Mrs. Pandolfi who testified Mr. Alker and Mrs. Hurst were personal

friends; and Mrs. McGuigan testified she remembered Mrs. Hurst's visiting Mr. Alker at his office in 1948.

Petitioner contends, in following the Court's yardstick, that Mrs. Hurst did not show such alleged bodily infirmity and greatly weakened mentality at the time of executing her will. To the contrary, he offers and argues that the evidence is directly opposite to that.

In support of this contention we have the testimony of the contestants' witnesses themselves that Mrs. Hurst was always out sweeping the pavement, taking long walks and working in the garden. We also have Susie's testimony of Mrs. Hurst's physical activities for a long time before and up to and beyond December 2, 1949. That she walked to the store and shopped; used public transportation facilities and climbed up and down subway steps, and continuously did work around the house.

Also the testimony of Dr. Crew greatly fortifies this contention of not having bodily infirmity and greatly weakened mentality. He testified that prior to December 12, 1949, Mrs. Hurst was an average or normal woman of her age and that he had not observed any mental confusion resulting from arteriosclerosis prior to decedent's hospitalization on December 12, 1949; that she had no serious illnesses prior to December 12, 1949.

The Trial Court found that contestants' evidence was not sufficient to overcome Dr. Crew's testimony to prove lack of testamentary capacity, and it, therefore, should not be strong enough to prove a contention of influence, particularly so when the neighbor witnesses were prejudiced against Mr. Alker and the others had a pecuniary interest in Winfred Hurst's estate.

Dr. Crew's testimony which was accepted by the Trial Court certainly eliminates that part of the yardstick pertaining to the arteriosclerosis, current sickness, incoherence and alleged memory lapses.

An examination of all the evidence in the instant case, following the same yardstick, nowhere shows or discloses (1) any imprisonment of the body or mind of Annie E.

Hurst by Harry J. Alker, Jr.; (2) nor frauds, threats, misrepresentations; (3) nor circumstances of inordinate flattery; (4) nor physical or moral coercion to such a degree as to prejudice the mind of Mrs. Hurst; nor any influence that destroyed her free agency or to operate as a present restraint upon her in the making of the will.

Referring to Alker as a stranger to the blood of Mrs. Hurst, we must keep in mind that the contestants are also strangers "to her blood" and not only that, but were utterly disliked by her, also, the possibility of escheat in her estate and her intention to keep away from such.

It is also argued by petitioner that there was no need to question the testatrix as to her desire to leave anything to charity or religious orders as she had distinctly told him what she wanted done with her property and had not been, in her recent years, a regular Church going person.

Testamentary distortion is mentioned by the Trial Court but this should not be considered in this matter as all parties concerned herein are "strangers to the blood".

Nor can "testamentary distortion" be adjudicated as a result of a preference between persons of the same class who are or who are not strangers to the blood. *Di Maio's Estate*, 563 Pa. 559.

It has also been held that it is not necessarily "testamentary distortion" when one names as a beneficiary a person who has acted in a fiduciary or advisory capacity. *Mohler's Estate*, 343 Pa. 299.

As stated previously, the Courts below accepted Dr. Crew's statement that as of those two dates, namely, December 1st and December 3rd, decedent was a normal, average person of 74 years of age. Nevertheless they ignored for their consideration of undue influence that strong evidence and their own acceptance of that evidence, and found as a medical, physical fact that the decedent was not a normal, average person of 74 years of age, but on the contrary, was one who was suffering from bodily infirmities and a greatly weakened mentality (N. T. 835a).

In finding such bodily infirmity and a greatly weakened mentality, the Courts also ignored the uncontradicted evidence that decedent voluntarily came from her suburban home to Alker's central office on December 2, 1949, in inclement weather and also ignored the positive testimony of the subscribing witnesses, and the unimpeachable evidence of decedent's clear, firm signature (3a).

Neither the existence of a confidential relationship nor "testamentary distortion" afford any legal justification to ignore uncontradicted evidence that decedent was neither suffering from bodily infirmity nor in a state of greatly weakened mentality when she executed her will.

It is submitted that as the Courts have accepted and adjudicated that Mrs. Hurst was an average, normal 74 year old woman, that is the law of this case and as the law of this case it is binding on the Trial Court and Appellate Court.

The petitioner further contends that the contestants cannot prove their case by cross-examination, and, if any of such inferred evidence was used by the Trial Court, it was improper.

The petitioner again reiterates that the basic factual conclusions found by the Supreme Court of Pennsylvania, namely that the scrivener Alker had only known Mrs. Hurst four weeks prior to the drafting and execution of her will, is a factual conclusion unsupported by any evidence in the record, and contradicted by substantial evidence in the record, such as, but not limited to Mrs. Pandolfi's and Mrs. McGuigan's testimony as well as that of the petitioner Alker as to being personal friends and decedent having visited Alker in 1948, respectively, and as to Alker's representation of the Hurst family, all of which were matters of public record.

The petitioner further claims that the Trial Court and Appellate Court were biased and prejudiced against him when they disregarded substantial and basic uncontested evidence as described in paragraph 2 of Appellant-Petitioner's Petition for Reargument.

"If a law is so applied and administered as to make unjust discrimination between persons in similar circumstances material to their rights, such denial of equal justice violates "due process of law" and "equal protection of the laws" clauses of the Federal and state constitutions."

Howard Sports Daily v. Wellar, 18 A. 2nd. 210 179 M. D. 355.

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons evidenced by petitioner, the Petition for a Writ of Certiorari should be granted by this Honorable Court.

That Petitioner has legally shown Annie E. Hurst was physically and mentally capable of executing her will on December 2, 1949, which she did execute voluntarily, and no undue influence was exercised upon her by Harry J. Alker, Jr.; and for the foregoing reasons petitioner has been deprived of due process of law as alleged by him, as has Mrs. Hurst been so deprived.

Also that the execution by Mrs. Hurst of her will in the manner in which she did same was her constitutional right to do it and to rule otherwise, as was done in this case, was a violation of such constitutional rights under the Fourteenth Amendment; that the right of the testatrix to make a will in the manner she desired and name the petitioner executor as she did and devised and bequeathed the property as she did is her property right and any interference therewith constitutes a violation of her rights and privileges under the Fourteenth Amendment; and the right of petitioner to receive that which the testatrix devised and bequeathed to him is also a property right, and a violation of same is also a constitutional violation of his rights, as well as his right to act as executor of her will.

Respectfully submitted,

ROBERT M. TAYLOR,
Attorney for Petitioner.

Appendix.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 68, January Term, 1961.

IN RE: ESTATE OF ANNIE E. HURST, DECEASED

APPEAL OF HARRY J. ALKER, JR.

Appeal From the Final Order of the Orphans' Court for the County of Montgomery, as of No. 58,815.
Entered: June 22, 1961.

OPINION.

Filed: March 13, 1962

EAGEN, *J.*

This is an appeal from the lower court's adjudication in a will contest wherein an issue devisavit vel non was granted and the issue tried before a judge without a jury.

The testatrix, Annie E. Hurst, executed the disputed will on December 2, 1949. She was then seventy-four years of age. She died January 19, 1958.

The testatrix lived with her son, Winfred Hurst, who died unexpectedly of heart failure on November 7, 1949, while in early middle age. There were no other next of kin. In his will, Winfred Hurst, gave Harry J. Alker, Jr., then an attorney,[1] one-eighth of his residuary estate and also

1. See, In re Alker, Jr., 16 D. & C. 2d 653, aff'd per curiam 398 Pa. 188 (1960).

named Alker, Executor and Trustee. The will also specifically established a $100,000 trust fund for the support and maintenance of Winfred's mother, Annie E. Hurst. Alker was named the sole trustee of this fund with full authority to use both the income and principal for the purposes stated. The will further provided: "(M)y mother shall have the right to dispose by her will up to Twenty-five thousand dollars ($25,000) of the estate remaining in trust under this paragraph for her at the time of her death. If she should not exercise the power of appointment aforesaid, then all the principal estate remaining in trust under this paragraph at her death shall pass under, and become part of the estate disposed of by, the residuary clause of this my will."

The will in contest was executed by Annie E. Hurst less than one month following her son's sudden demise. At that time, she owned personal property valued at approximately $29,000, her residence and the testamentary power of appointment provided for in her son's will. At the time of her death, her probate estate approximated $46,000 in value and her appointive estate $25,000.

The will bequeathed the sum of $10,000 to her maid, Mary Lee Hill (Dandridge), and $5000 to her personal physician, Dr. Robert S. Crew. The entire balance of the estate, approximately $56,000 in value, was given to Harry J. Alker, Jr. absolutely. He was also named Executor.

The validity of the will was contested by some of the residuary legatees under Winfred's will, who claim they are entitled thereunder to the $25,000 remaining in the trust fund in the event that Annie E. Hurst failed to exercise the given power of appointment. Two issues were raised: (a) lack of testamentary capacity, and (b) undue influence. The court, after an exhaustive hearing and a searching study of the evidence, found that the decedent possessed testamentary capacity, but that Harry J. Alker, Jr. had exercised undue influence. Thus the specific legacies to Mary Lee

Hill (Dandridge) and Dr. Crew were sustained but the legacy to Alker and his appointment as Executor were invalidated.

Alker prosecutes this appeal. He maintains that the court erred in finding the existence of undue influence and also questions the legal standing of the appellees in this appeal. There is no merit to either contention.

STANDING OF APPELLEES

Alker argues that the appellees, residuary legatees under Winfred's will, have nothing to gain in this litigation and, therefore, enjoy no interest or legal standing to be party-litigants. He asserts that if the will is not sustained the entire sum in controversy will escheat to the Commonwealth of Pennsylvania. This is not correct and the record fails to justify any such conclusion.

The Commonwealth asserts no claim to the $25,000 appointive estate of the testatrix. Certainly, Alker has no standing to make any such demand for the Commonwealth. More importantly, if Alker procured the making of this will by undue influence, then any provisions thereof inuring to his benefit are completely null and void. This is singularly so in regard to the power of appointment. Alker was in fact the sole beneficiary under the testatrix's purported exercise of this power. The probative estate is more than ample to pay the only valid bequests. If Alker's unfair and illegal conduct influenced the making of this will in his favor, as the lower court found and the record abundantly sustains, his claim to any benefits thereunder is void and completely forfeit.

Under the circumstances presented, the exercise of the power of appointment by Annie E. Hurst was void ab initio, and those named in Winfred's will as residuary legatees, because of the failure of the testatrix to exercise the power of appointment, are entitled to distribution of the sum in-

volved: See, *Hays's Estate*, 288 Pa. 348, 135 Atl. 626 (1927); *DeCharette v. DeCharette*, 104 A. L. R. 1455 (Ky. 1936).

UNDUE INFLUENCE

In *Quein Will*, 361 Pa. 133, 62 A. 2d 909 (1949), this Court at 145, succintly defined what constitutes undue influence sufficient to void a will, and explained the burden and nature of proof where such is asserted. "There must be imprisonment of the body or mind, frauds or threats or misrepresentations, or circumstances of inordinate flattery, or physical or moral coercion to such a degree as to prejudice the mind of the testator, or destroy his free agency, or to operate as a present restraint upon him in the making of the will:" Generally, there is a presumption of the absence of undue influence and the burden of proof is upon those who assert it. However, "where there is evidence of *confidential* relation coupled with a *weakened mind*, the burden of proof shifts to the proponents. Such evidence, however, need not be sufficient to establish testamentary incapacity. All the evidence need show is bodily infirmity and *weakened mentality*. Where the evidence shows bodily infirmity and greatly *weakened mentality*, and a stranger to the blood of the testator, standing in a confidential relationship, is benefited by the will in which he has been instrumental in having executed, a *presumption of undue influence arises*." pp. 145 and 146. Accord, *Kerr v. Donovan*, 389 Pa. 614, 134 A. 2d 213 (1957).

In the present case, it is admitted that a confidential relationship existed between Alker and the testatrix; also, that he was her advisor, the scrivener of her will; that he was the individual to whom she had to look for support and maintenance following her son's death; and, that at the time she made him the primary beneficiary under her will she knew him for a period of less than four weeks. The evidence clearly justifies the finding that during the period the will was executed she suffered from shock and grief caused

by her son's recent death and was in a state of bodily infirmity and greatly weakened mentality. Hence, the burden of proving the absence of undue influence was definitely upon Alker. See, *Pusey's Estate*, 321 Pa. 248, 184 Atl. 844 (1936).

To meet this burden, he offered his own testimony as to his relationship with the testatrix; the circumstances incident to the execution of the will; the testimony of the subscribing witnesses; the testimony of the maid, Mary Lee Hill (Dandridge) and Dr. Crew. This evidence, if believed, tended to establish that at the time involved, the testatrix was comparatively healthy, mentally alert, competent to manage her business affairs and that the will was her free and voluntary act. In view of this evidence, it is strenuously argued that the burden of proving the absence of undue influence was completely fulfilled and that the burden of then going forward with proof of its existence returned to the contestants. It is submitted that this challenge went unanswered.

A detailed study of the record quickly manifests the hollowness of this position. The court below refused to believe the testimony of Alker. There was sound reason for this conclusion. The testimony of Mary Lee Hill (Dandridge), badly shaken on cross-examination, was contradicted by undeniable proof of several disinterested witnesses. These included neighbors who testified that from the year 1946, the testatrix became increasingly confused and incoherent; that during the year 1949, she was completely incoherent and incompetent; that she would wander away and be unable to find her way home; that she absent-mindedly visited neighbors' homes and began cleaning the house thinking it was her own; that she would visit neighbors' homes and introduce herself, as if for the first time, as the lady living next door; that she frequently failed to recognize her own son, Winfred, shortly before his death; that after his demise she continued in her belief that he was still alive; that as Winfred lay in his coffin, she thought it was her husband long since deceased and frequently asked

about "Win" and if he were coming to the funeral. These and other circumstances firmly established by the record lead to no other conclusion but that the testatrix and Alker did not deal on equal terms and that he took advantage for his own financial gain. Needless to say, undue influence may be established by circumstantial evidence: *Boyd v. Boyd*, 66 Pa. 283 (1874); *Kerr v. Donovan, supra.*

Finally, it is argued that the testatrix had ample opportunity to change her will and not having done so, this fact alone contraverts the existence of undue influence.[2] Again this overlooks the established facts.

The will was executed on December 2, 1949. As pointed out hereinbefore as of that time, the testatrix suffered greatly from weakened mentality. Ten days later, on December 12, 1949, she suffered an accidental fall, causing a fractured thigh, serious shock and noted increased disorientation. Until her death, her condition failed to improve and in fact grew steadily worse. She was committed as a mental patient to a sanitarium on June 28, 1950. Alker signed the application. Under such facts, the failure to change the will is readily understandable and of no significance. Additionally, in view of all the record discloses, if the execution of the will and its import were ever fully recognized by the testatrix, it is reasonable to conclude that it was completely forgotten very shortly after its execution.

We find no error in the trial of the proceedings.

Order affirmed. Costs to be paid by the appellant.

---

2. Undue influence must be exerted proximate to the date of the executed will and be a direct cause of the provisions or some of the provisions therein, *Williams v. McCarroll*, 374 Pa. 281, 97 A. 2d 14 (1953).

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 68.

January Term, 1961.

In re: ESTATE OF ANNIE E. HURST, DECEASED.

Appeal of HARRY J. ALKER, JR.

PETITION FOR REARGUMENT.

To the Honorable Court:

AND NOW comes appellant and petitions this Court for reargument of the above entitled matter because the adjudication and Opinion by this Court are a denial of federal and state constitutional due process for the reasons as set forth below:

1. A basic factual conclusion found by this Court, namely, that the scrivener had only known decedent four weeks prior to the drafting and execution of her will, is a factual conclusion unsupported by any evidence in the record and contradicted by substantial evidence in the record, such as, but not limited to the following portions of the record:

(a) The testimony of subscribing witness Mary Pandolfi, who stated that the decedent and the scrivener had been personal friends (279a-280a).

(b) The scrivener's testimony that he had previously represented and litigated a negligence claim for the de-

cedent's sister, and that he had been attorney of record in the settlement of decedent's sister's estate (621a) and that the decedent's sister died in 1944 (629a), and that the decedent was the heir of that estate and said participation of scrivener as attorney in that estate is a matter of judicial record with the Register of Wills, Commonwealth of Pennsylvania, in the Estate of Catherine S. Gertslauer, and appears of record in Will Book 348, page 425.

(b) A disregard of substantial and basic uncontested evidence which is inconsistent with the factual and legal conclusion reached in the adjudication and Opinion by this Court, such as, but not limited to, the following portions of the record or appellant's brief:

(a) That decedent, the day before and the day following the execution of her will, was examined by her physician, who then found her to be a relatively healthy woman (Brief p. 6).

(b) That the Court Below found said examining doctor to be an accurate and reliable and competent witness (Brief p. 6).

(c) That the Court Below found that the decedent had testamentary capacity and thus rejected the testimony of the contestants' witnesses that she did not have testamentary capacity (Brief p. 5).

(d) That decedent voluntarily three times traveled by public transportation from her suburban home to the appellant's central city office for the discussion of preparation of and execution of her will (Brief p. 7).

(e) That the two subscribing witnesses testified that the decedent appeared to understand and comprehend the will. (Brief p. 7).

(f) That the decedent's signature is in a firm clear hand and contradicts the allegations that she was senile (Brief p. 18).

3. A basic disregard of the limited scope of the appeal from the adjudication of the Court Below, in that:

(a) The appeal was limited to that portion of the adjudication of the Court Below which invalidated, due to undue influence, that portion of decedent's will which named scrivener residuary beneficiary and executor and no appeal was taken from any other portion of the adjudication of the Court Below, particularly no appeal was taken from the portion of the adjudication of the Court Below which found decedent had testamentary capacity and therefore had capacity to exercise her testamentary power of appointment.

WHEREFORE it is prayed that this Court grant reargument for reconsideration of the above.

Respectfully submitted,

W. J. WOOLSTON,
William J. Woolston,
Attorney for Appellant.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

No. 68.

January Term, 1961.

IN RE: ESTATE OF ANNIE E. HURST, DECEASED.

APPEAL OF HARRY J. ALKER, JR.

ANSWER TO PETITION FOR REARGUMENT.

To the Honorable, the Justices of the Supreme Court of Pennsylvania:

AND NOW, come the appellees and answer appellant's petition for reargument and respectfully request that this petition be denied:

1. The Orphans' Court of Montgomery County found that except for his professional confidential relationship as trustee for testatrix, which existed for a period of four weeks prior to the execution of the will, Mr. Alker, the scrivener, had no connection with the testatrix (839a). This finding by the lower court and the record fully support the conclusion of the Court that at the time testatrix made Mr. Alker the primary beneficiary of her will, she had only known him for a period of less than four weeks.

(a) The testimony of Mary Pandolfi relied on by petitioner was stricken from the record (280a).

(b) There was no evidence in the record that testatrix had any interest in the negligence claim of her sister nor that she participated in any way in the settlement of the estate of her sister who died in 1944. Her share of that estate was not even physically delivered to her but was

distributed to her son who had it in his possession at the time of his death in 1949 (632a).

2. The Court in its opinion did not disregard substantial and basic uncontested evidence.

(a) The testimony of testatrix's physician was contraverted by the witnesses of the contestants and the Orphans' Court of Montgomery County concluded that testatrix suffered bodily infirmity and greatly weakened mentality at the time of execution of the will because of her old age, arteriosclerotic condition, current sickness, occasional repetitious and incoherent speech, peculiar conduct, memory lapses, and the recent death of her son (837a). The fact that her physician by coincidence or otherwise examined testatrix on the day before and the day following the execution of the will itself warrants suspicion.

(b) The examining doctor testified that it was possible that other persons who had the opportunity of observing testatrix more often than he could have observed the mental confusion symptoms accompanying the gradual development of the arteriosclerotic condition (463a).

(c) It is admitted that the court below found that decedent had testamentary capacity but the court further found that contestants' witnesses established bodily infirmity and greatly weakened mentality of testatrix to support the conclusion of undue influence (835a, 837a).

(d) The trips made to scrivener's center city office were made on each occasion in the company of testatrix's maid, a beneficiary under the will. It is denied that the purpose of these visits was to discuss the preparation and execution of her will as her maid testified that one visit was to determine whether she had any money and that she did not know the purpose of the other visits (400a, 402a, 403a).

(e) The testimony of the subscribing witnesses was very adequately described by the court below as "fragmentary" (834a).

(f) There was no evidence to show any connection between senility and handwriting. Even contestants' evidence establishes that testatrix was a physically active person.

3. It is submitted that the Court has correctly concluded that all portions of this will which would have inured to the benefit of Harry J. Alker, Jr., were void ab initio because procured by undue influence, and that the points raised in appellant's petition were fully considered in the briefs and oral argument and in the opinion of your Honorable Court.

WHEREFORE, appellees respectfully request that appellant's petition for reargument be denied.

/s/ J. PENNINGTON STRAUS,
J. Pennington Straus,
/s/ IRVIN STANDER,
Irvin Stander,
Special Assistant Attorney
General of Pennsylvania,
/s/ VICTOR J. ROBERTS,
Victor J. Roberts,
Attorneys for Appellees.

WILL.

I, WINFRED S. HURST, of 525 E. Willow Grove Avenue, Wyndmoor, Montgomery County, Pennsylvania, being of sound and disposing mind, memory and understanding, do make, publish and declare this as and for my last will and testament, hereby revoking and making void all wills by me at any time heretofore made:

FIRST: I order and direct my Executor hereinafter named to pay all my just debts and funeral expenses as soon as conveniently may be after my decease.

SECOND: I give, devise and bequeath unto my mother Annie E. Hurst if she survives me all my clothing, wearing apparel, jewelry, toilet and traveling articles, furniture, silver and household goods, my automobile and my automobile and garage accessories, together with my house known as 525 E. Willow Grove Avenue, Wyndmoor, including the lot or lots and buildings thereon, together with all insurance policies on the foregoing.

THIRD: I give and bequeath unto Russell C. Pullinger the contents of my office, including desk, papers, files, office furniture, and my business, provided he immediately assumes my lease of my office and relieves my estate from any expense whatsoever after my death in connection with said business, and further provided that all unpaid bills for services rendered actually completed or billed at the time of my death shall not belong to him but shall be turned over to my Executor when collected.

FOURTH: I give and bequeath my stamp collection to Jean and Jane Roth of Pottsville, Pennsylvania, jointly, with the suggestion that they hold the same during their lives.

FIFTH: All the foregoing legacies shall be free and clear of all transfer, legacy, succession, estate and inher-

itance taxes, and any such taxes thereon shall be paid by my Executor out of the principal of my residuary estate.

SIXTH: All the rest, residue and remainder of the property and estate, of every kind and wheresoever situate, real, personal and mixed, of which I shall die seized or possessed, and all of the property and estate, of every kind and wheresoever situate, real, personal and mixed, as to which I shall have any power of appointment whether by will, deed or other writing, I give, devise and bequeath as follows:

(a) One hundred thousand dollars ($100,000) thereof to the Trustee hereinafter named, in trust, nevertheless, to hold, retain in cash or invest and keep invested in United States bonds or certificates, collect the income therefrom, and, after deducting the expenses of the trust, pay to, or in the discretion of the Trustee apply to the maintenance and support of, my mother Annie E. Hurst for and during the term of her natural life, the income together with such portion of the principal as with the said income shall equal the sum of One hundred dollars ($100.00) per week, together with such additional sums out of the principal from time to time as in the discretion of the Trustee may be necessary for her proper maintenance and support. The income and principal payable to my mother and applicable to her support shall be free and clear of all transfer, inheritance, legacy, estate and succession taxes, and all such taxes thereon shall be paid by my Executor or Trustee out of the principal of my residuary estate.

If on the settlement of my estate by my Executor the net balance for distribution shall have amounted to One hundred thousand dollars ($100,000) over and above the sum necessary for the setting up of the above trust then my mother shall have the right to dispose by her will up to Twenty-five thousand dollars ($25,000) of the estate remaining in trust under this paragraph for her at the time of her death. If she should not exercise the power of appointment aforesaid, then all the principal estate remaining

in trust under this paragraph at her death shall pass under, and become part of the estate disposed of by the residuary clause of this my will.

(b) After provision for the trust aforesaid I give and bequeath the balance as follows:

(1) The sum of Fifty thousand dollars ($50,000) to my Trustee, in trust, nevertheless, to hold, invest and keep invested in Government bonds, collect the income therefrom, and, after deducting the expenses of the trust, pay out of income to the extent income is available and then out of principal the sum of Twelve hundred and fifty dollars ($1,250.00) each quarter to Clara L. Roth for and during the term of her natural life and from and after her death quarterly divide Twelve hundred and fifty dollars ($1,250.00) between her two daughters Jane and Jean and from and after the death of one of them—her mother being then deceased—pay Twelve hundred and fifty dollars ($1,250.00) to the survivor until the fund is exhausted;

(2) The sum of Ten thousand dollars ($10,000) each to Russell C. Pullinger, my assistant, and Rae Newmark, my secretary;

(3) The sum of Ten thousand dollars ($10,000) to Marguerite Sommers now of 455 W. Harvey Street, Philadelphia, Pennsylvania, if she survives me, or to Frank Shelter, her brother, if she does not survive me;

(4) The sum of One thousand Dollars ($1,000) to every other employee of me in my office or home at the time of my death;

(5) The sum of One thousand dollars ($1,000) each to Mr. Molloy and Mrs. Molloy now residing at 527 E. Willow Grove Avenue, Wyndmoor, Pennsylvania;

(6) The sum of One thousand dollars ($1,000) each to Mr. Gilbert A. Sitler and Mrs. Gilbert A. Sitler, now residing at 1944 W. Market Street, Pottsville, Pennsylvania;

(7) The foregoing legacies and bequests shall be free and clear of all transfer, legacy, succession, estate and inheritance taxes, and any such taxes thereon shall be paid by my Executor out of the rest of my residuary estate;

(8) The rest to the following named persons or their respective estates;

Russell C. Pullinger	—or his estate—	one full equal share
Rae Newmark	—or her estate—	one full equal share
Mrs. Gilbert A. Sitler	—or her estate—	one full equal share
Clara L. Roth	—or her estate—	one full equal share
Jane Roth	—or her estate—	one full equal share
Jean Roth	—or her estate—	one full equal share
Marguerite Sommers	—or her estate—	one full equal share
Harry J. Alker, Jr.	—or his estate—	one full equal share

SEVENTH: I nominate, constitute and appoint Harry J. Alker, Jr., Executor hereof and Trustee hereunder.

No Executor or Trustee hereof shall be required to give bond or enter security.

If Harry J. Alker, Jr., should not survive me, then I appoint Russell C. Pullinger the Executor and Trustee in his stead, and, if he also shall not survive me, I appoint one of the following in order named: Gilbert A. Sitler or Clara L. Roth, or one of her daughters.

EIGHTH: I authorize and empower the Executor hereof to sell, at either public or private sale or sales and for such price or prices as he shall deem advisable, any real estate of which I shall die seized, and I further authorize and empower the said Executor to make, execute, acknowledge and deliver all instruments, and do all things, necessary or advisable to effectuate any such sale or sales, without any responsibility on the part of the purchaser or purchasers to see to the application of the purchase moneys.

NINTH: I authorize and empower the Trustee hereunder to sell, at either public or private sale or sales and

for such price or prices as he shall deem advisable, any real estate which shall at any time form part of any estate held in trust hereunder, and I further authorize and empower said Trustee to make, execute, acknowledge and deliver all instruments, and do all things necessary or advisable to effectuate any such sale or sales, without any responsibility on the part of the purchaser or purchasers to see to the application of the purchase moneys.

TENTH: My Executor and Trustee are not to invest in anything but United States Government securities.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 4th day of September, A. D. 1944.

Signed, sealed, published and declared by the above-named testator as and for his last will and testament in the presence of us, who, at his request, in his presence and in the presence of each other —all being present at the same time—have hereunto subscribed our names as witnesses.

(sgd) WINFRED S. HURST (SEAL)

(sgd) ELIZABETH M. MARR
1528 Pine St., Phila., Pa.

(sgd) EDWIN HALL, 2ND
1505 Land Title Building
Phila., Pa.